Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-4671

JOHN A. WIETHE,
Appellant,

vs.

C. DONALD CURRY, REGISTRAR,
Respondent.

On Appeal From The Supreme Court of Ohio and the Court of Appeals, First Appellate District of Ohio

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Questions Presented	3
Statement	4
The Federal Questions Are Substantial	7
I. O.R.C. Sec. 4511.191 Should be Found to be Unconstitutional Because It Provides For a Deprivation of Property Without Due Process.	8
II. O.R.C. Sec. 4511.191 is Unconstitutional Since it Does Not Require A Person to Have Been Lawfully Arrested Prior to His Being Asked to Submit to the Chemical Test.	11
III. The Exclusion of Essential Elements From the Hearing Does Not Meet The Constitutional Standards Established By This Court.	12
IV. Statutes Which May Be Otherwise Constitutional May Be Applied In An Unconstitutional Manner.	14
Conclusion	15

Page

Appendix A — Decision of the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio 1a

Appendix B — Decision of Hamilton County Municipal Court 10a

Appendix C — Notice of Appeal to the Supreme Court of the United States, filed in the Court of Appeals, Hamilton County, Ohio 12a

Appendix D — Notice of Appeal to the Supreme Court of the United States, filed in the Supreme Court of Ohio 13a

Appendix E — Order of Supreme Court of Ohio 14a

Appendix F — Decision of Supreme Court of Ohio dismissing the appeal 15a

Appendix G — Opinion of United States District Court for the District of Arizona in case No. Civ. 73-163 Phx WEC. Ernest Costaneda Chavez, Plaintiff v. David H. Campbell, Supt., Motor Vehicle Division, Arizona Highway Department, Defendant 16a

Appendix H — Statutes
Ohio Revised Code, Section 4511.191 ..... 23a

TABLE OF CASES

	Page
Argersinger v. Hamlin, 407 U.S. 75 (1971)	10, 13
Bell v. Burson, 402 U.S. 535 (1971)	7, 8, 10, 12, 14
Bell v. Curry, 68 O.O. 2d 109 (1974)	6, 8, 9, 14
Chavez v. Campbell, #Civ.-73-163 (D. Ariz. 1973)	8, 9
Fell v. Bureau of Motor Vehicles, 30 Ohio App. 2d 151 (1972)	7, 8, 14
Fuentes v. Shevin, 407 U.S. 67 (1972)	7, 8, 10
Goss v. Lopez, 419 U.S. 565	7, 10
Holland v. Parker, 354 F. Supp. 196 (D.S.D. 1973)	9, 11
Michigan-Wisconsin Pipe Line Co. v. Calvert, Comptroller of Public Accounts, 347 U.S. 157 (1954)	2
One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 293 (1965)	11, 13
Schmerber v. California, 384 U.S. 757 (1966)	11
Slone v. Kentucky Department of Transportation, 379 F. Supp. 652 (E.D. Ky. 1974) aff'd on other grounds, #74-2163 (6th Cir. 1975)	9
State v. Starnes, 21 Ohio St. 2d 38 (1970)	6, 7, 8

TABLE OF CONSTITUTIONAL AND STATUTORY PROVISIONS

O.R.C. Sec. 4511.191	2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14
O.R.C. Sec. 2935.20	13
28 U.S.C. Sec. 1257 (2)	2
28 U.S.C. Sec. 2103	3

IN THE

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No. ————

JOHN A. WIETHE,

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vs.

C. DONALD CURRY, REGISTRAR,

Respondent.

On Appeal From The Supreme Court of Ohio and the Court of Appeals, First Appellate District of Ohio

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JURISDICTIONAL STATEMENT

OPINION BELOW

The decision of the Supreme Court of Ohio dismissing Appellant's appeal for want of a substantial constitutional question is reported at p. 94, Vol. 71, No. 13, Ohio Opinions 2d, #75-341 (June 27, 1975). The unreported opinion of the Court of Appeals, First Appellate District of Ohio, is set forth in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257 (2), this being an appeal which draws into question the validity of Ohio Revised Code Section 4511.191, set forth in the Appendix, on the ground that it is repugnant to the Constitution of the United States.

Under the statutory scheme of O.R.C. Sec. 4511.191, Appellant timely filed an appeal from the action of the Respondent suspending Appellant's driver's license for failure to submit to a chemical test for alcohol in the blood. On August 30, 1974, the Hamilton County Municipal Court held that O.R.C. Sec. 4511.191 was constitutional and that Appellant had failed to show error on the part of Respondent. This decision was affirmed by the Court of Appeals, First Appellate District of Ohio, on March 24, 1975. A timely appeal to the Supreme Court of Ohio was filed, but the Court dismissed the appeal and declined to hear argument on the merits. This decision was rendered on June 27, 1975. Timely notice of appeal to this Court was filed on September 16, 1975, in the Court of Appeals, First Appellate District of Ohio, the Court possessed of the record of this case.

Since the two lower Courts specifically rejected Appellant's contention that O.R.C. Sec. 4511.191 is unconstitutional, and since the Supreme Court of Ohio, which treats a Notice of Appeal as both an Appeal and a Motion to Certify (Sup. Ct. R. II (2)), has dismissed an appeal to it, this matter is appropriately brought to this Court by appeal. *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, Comptroller of Public Accounts,* 347 U.S. 157 (1954).

In the event that the Court does not consider appeal the proper mode of review, Appellant requests that the

papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. Sec. 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States and Ohio Revised Code Section 4511.191, set forth in its entirety in the Appendix.

QUESTIONS PRESENTED

1) WHETHER O.R.C. SEC. 4511.191 WHICH PERMITS THE REGISTRAR OF THE OHIO BUREAU OF MOTOR VEHICLES TO SUSPEND THE DRIVER'S LICENSE OF AN INDIVIDUAL PRIOR TO HIS BEING GIVEN NOTICE AND AN OPPORTUNITY FOR A HEARING VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

2) WHETHER O.R.C. SEC. 4511.191 VIOLATES THE FOURTH AND FIFTH AMENDMENTS AS APPLIED TO THE STATES BY THE FOURTEENTH AMENDMENT BY NOT REQUIRING AS A PRECONDITION FOR ITS APPLICABILITY THE LAWFUL ARREST OF THE PERSON WHOSE LICENSE IS SOUGHT TO BE SUSPENDED?

3) WHETHER O.R.C. SEC. 4511.191 WHICH EXCLUDES ESSENTIAL ELEMENTS OF DUE PROCESS FROM THE HEARING ON APPEAL OF THE SUSPENSION OF A PERSON'S DRIVER'S LICENSE VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

4) WHETHER, ASSUMING THE SUSPENSION MANDATED BY O.R.C. SEC. 4511.191 IS NOT EFFECTIVE PRIOR TO NOTICE AND AN OPPORTUNITY FOR A HEARING, THE ACTION OF THE REGISTRAR SUSPENDING THE LICENSE OF APPELLANT PRIOR TO NOTICE AND AN OPPORTUNITY FOR A HEARING VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

STATEMENT

The Appellant in this case, John A. Wiethe, was stopped for speeding on I-75 in Cincinnati, Ohio, by a member of the Cincinnati Police Division. After the officer alleged that an accident had occurred and after his supervisor was summoned to the scene, plaintiff was taken to the headquarters of the Alcohol Safety Action Program. (R. pp. 11-14).

Once at ASAP headquarters, plaintiff contacted his attorney who arrived on the scene within one-half hour. At this point, the officers requested that plaintiff submit to a breathalyzer test for alcohol content in his blood. Plaintiff requested permission to have his physician present for the purpose of withdrawing blood so that an independent test could be run which could be preserved and re-tested at any later date. (R. pp. 21, 24-26, 30).

Plaintiff's attorney was unable to reach either of two doctors suggested by the plaintiff whereupon the officers once again demanded that he submit to the test. Plaintiff continued to state that he would not take the test unless his physician were present to contemporaneously withdraw blood. Under these circumstances, the officers concluded that he had refused to take the test, and then placed him under arrest for driving while intoxicated.

Plaintiff, after a two day trial on the merits, was acquitted on the charge of driving while intoxicated.

The police officers, pursuant to Ohio Revised Code § 4511.191, certified to the Registrar of the Bureau of Motor Vehicles that the officers had reasonable grounds to believe that plaintiff was operating a motor vehicle while under the influence of alcohol; that plaintiff was arrested for this offense; that plaintiff refused to submit to a chemical test when requested to do so by the officers, and that plaintiff was advised of the consequences thereof.

On October 29, 1973, pursuant to O.R.C. § 4511.191 (D), the Registrar of the Bureau of Motor Vehicles sent plaintiff a letter which stated in pertinent part:

> ". . . your driver license or privilege to operate a motor vehicle in this State is hereby suspended for a period of six months effective October 29, 1973, and any Ohio license issued to you and duplicate thereof must be returned to this office immediately."

Appellant filed a petition to set aside the suspension and alleged, *inter alia*, that O.R.C. Sec. 4511.191 was unconstitutional. A hearing was held in the Hamilton County Municipal Court on August 7, 1974. During the hearing, the Judge refused to permit evidence to be introduced on matters outside the specific scope of the hearing set forth in Sec. 4511.191 (F); and on August 30, 1974, after considering memoranda filed by each side, ruled that "A) Section 4511.191 O.R.C., the implied consent statute is constitutional" and upheld the suspension.

This decision was appealed to the Court of Appeals, First Appellate District of Ohio. The Appellant alleged there that Sec. 4511.191 was unconstitutional; was applied in an unconstitutional manner if otherwise constitutional; and that a suspension for refusing to take a breath-

alyzer test when offering to take other chemical tests was unconstittuional.

The Ohio Appellate Rules require that all assignments of error shall be specifically passed upon. App. R. 12. The Court states in its Decision:

> ". . . The first assignment contains the assertion that Section 4511.191, O.R.C. is unconstitutional. We preface our remarks on this assignment with the note that this statute has been judicially construed in Ohio and has repeatedly been found to be constitutional by the courts of this State, including its highest court. See, *State* v. *Starnes*, 21 OhioSt.2d 38; *Bell* v. *Curry*, 68 Ohio Op.2d 109. We are obviously not at liberty to re-examine this basic determination."

Appellant's second assignment of error contended: "Section 4511.191, if constitutional, was applied in an unconstitutional manner." The court's decision simply states, "The second assignment is without merit."

On March 26, 1975, Appellant filed his Notice of Appeal to the Supreme Court of Ohio. In his Memorandum in Support of Jurisdiction, Appellant presented four specific Propositions of Law raising Constitutional questions. They were:

1) Section 4511.191, Revised Code, while constitutional on its face, is applied in an unconstitutional manner when the Registrar of Motor Vehicles suspends a person's driver's license rendering that person subject to arrest for driving while under suspension prior to the twenty-day period in which the person may petition for review of his suspension. Such action by the Registrar is invalid and the person shall be fully restored to his driving rights.

2) Section 4511.191, Revised Code, is unconstitutional because it provides for a deprivation of property (a person's driver's license) prior to his being given the opportunity for notice and a hearing as required by the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

3) Section 4511.191, Revised Code, is unconstitutional as a violation of the Fourth and Fifth Amendments of the United States Constitution because it does not provide as a precondition for its applicability that the person have been lawfully arrested prior to his being asked to take the chemical test.

4) Section 4511.191 (F) is unconstitutional because it excludes essential elements of Due Process from the hearing in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

On June 27, 1975, the Supreme Court dismissed Appellant's appeal refusing to hear arguments on the merits of the constitutional issues raised in Appellant's Memorandum in Support of Jurisdiction.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

As construed by the Supreme Court of Ohio in *State* v. *Starnes*, 21 Ohio St.2d 38 (1970), and by the Courts of Appeals for Cuyahoga County, *Fell* v. *Bureau of Motor Vehicles*, 30 OhioApp.2d 151 (1974), and Hamilton County, *Wiethe* v. *Curry*, the instant case, O.R.C. Sec. 4511.191 is squarely in conflict with decisions of this Court on the issue of procedural due process. The basic cases which Appellant relies upon are *Bell* v. *Burson*, 402 U.S. 535 (1971); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); and *Goss* v. *Lopez*, 419 U.S. 565 (1975).

I.

O.R.C. Sec. 4511.191 Should be Found to be Unconstitutional Because It Provides For a Deprivation of Property Without Due Process.

The underpinnings of this position are found in the case of *Bell* v. *Burson,* 402 U.S. 535, decided by the United States Supreme Court in 1971, and *Fuentes* v. *Shevin,* 407 U.S. 67, decided the next year. Indeed, a three Judge Court in Arizona stated quite simply in striking down the Arizona Implied Consent Law, "To reach a determination of the present cause, we need go no further than *Bell* v. *Burson* . . . and *Fuentes* v. *Shevin* . . . ." *Chavez* v. *Campbell,* # Civ-73-163 (D. Ariz. 1973).

The Ohio Supreme Court has not reviewed O.R.C. § 4511.191 on the merits since its decision in 1970, in *State* v. *Starnes,* 21 Ohio St. 2d 38, and the Court of Appeals for Hamilton County stated quite bluntly, "We are obviously not at liberty to re-examine this basic determination." Having decided that it must find the statute to be constitutional it goes through some tortuous paths to reconcile two irreconcilable opinions, *Fell* v. *Bureau of Motor Vehicles,* 30 Ohio App. 2d 151 (Cuyahoga Cty. 1972), and *Bell* v. *Curry,* 68 O.O. 2d 109 (Ham. Cty. Mun. Ct. 1974).

The *Fell* case takes the incredible position that the suspension is only conditional. Since the statute provides that a person has twenty days in which to file an appeal and the statute further provides that if an appeal is filed the suspension shall begin when the appeal is terminated if the finding is adverse to the Appellant, the suspension therefore does not begin until after the hearing, if one is requested. If, however, no such appeal is filed, the suspension began on its original effective date.

Put quite simply, if we arrive at the Clerk's office at 3:59 p.m. on the 20th day and properly file our client's appeal, his license has never been suspended. If we arrive at 4:01 p.m., and cannot file his appeal because the Clerk's office is closed, his license has been suspended for twenty days and he has only five months and ten days left to serve on his suspension.

In *Bell* v. *Curry,* the Municipal Court judge adopted a more reasonable stance that the suspension is not effective until after the passing of twenty days. And while this is the way the law should read, it clearly is neither the way the law, in fact, does read, nor the way in which the registrar applied the law in making the suspension effective even before the plaintiff received notice that his license had been suspended.

It is not unusual, of course, for State Courts to find that its State's statutes meet federal constitutional demands only to have a Federal Court later strike the statute as being unconstitutional. Such was the case with the Kentucky Statute recently struck down by the late Judge Swinford.

Even though the Court of Appeals of Kentucky had held its Implied Consent Statute to be constitutional, Judge Swinford ruled that since the suspension was made effective prior to notice and an opportunity for a hearing, the Statute was unconstitutional as violative of the Due Process Clause of the Fourteenth Amendment. *Slone* v. *Kentucky Department of Transportation,* 379 F.Supp. 652 (E.D. Ky. 1974), aff'd on other grounds #74-2163 (6th Cir. 1975).

Such also was the case in the other two instances where Federal Courts have examined the Implied Consent statutes of their respective states. *Chavez* v. *Campbell, supra*; *Holland* v. *Parker,* 354 F. Supp. 196 (D.S.D. 1973). In fact, counsel is not aware of any Federal Court which has

upheld the constitutionality of any State's Implied Consent statute.

The whole question, as we noted earlier, stems from the decision in *Bell* v. *Burson,* 402 U.S. 535 (1971). In that case, the Court made it clear that a person's driver's license may not be taken away, except in an emergency situation, before he is given notice and an opportunity for a hearing. In any number of other property situations, the Supreme Court has consistently held that procedural due process requires the hearing to take place in advance of any deprivation. See, e.g., *Fuentes* v. *Shevin,* 407 U.S. 67 (1972); *Goss* v. *Lopez,* 419 U.S. 565 (1975).

The majority in *Goss* struck down an Ohio law which permitted public school principals to suspend students for up to 10 days without prior notice or a hearing. Justice White, speaking for the majority, said "as long as a property deprivation is not *de minimis,* its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." at 735. Such a property deprivation requires prior notice and an opportunity for a prior hearing.

In a dissenting opinion, Justice Powell takes issue with the *de minimis* standard. He argues that a "grevious" loss is necessary to trigger the Due Process Clause and cites some property rights the loss of which would constitute a grevious loss. Among those rights is the right to a driver's license as set out in *Bell* v. *Burson, supra.* See also *Argersinger* v. *Hamlin,* 407 U.S. 25 (1972) (Concurring Opinion).

Since Sec. 4511.191 (D) directs the Registrar to "suspend the person's license" and (E) directs him to notify the person "upon suspending the license", it is clear that the suspension is effective prior to notice and an opportunity for a hearing and is thus constitutionally infirm.

II.

O.R.C. Sec. 4511.191 is Unconstitutional Since it Does Not Require A Person to Have Been Lawfully Arrested Prior to His Being Asked to Submit to the Chemical Test.

The three-judge Court in *Holland* v. *Parker,* 354 F. Supp. 196 (D.S.D. 1973), held that the South Dakota Implied Consent Law was unconstitutional on two grounds. First, as we indicated above, it did not provide for a hearing prior to the effective date of the suspension. Secondly, it struck down the law because it held that while the South Dakota Statute provided that the person have been placed under arrest before it became operative, the statute did not require that the arrest have been *lawful.*

The *Holland Court* interpreted *Schmerber* v. *California,* 384 U.S. 757 (1966), as requiring three things: 1. There must have been probable cause to arrest; 2. The arrest must have been lawful; and 3. There must be an emergency to satisfy the bodily intrusion. Since the South Dakota Statute, like the Ohio Statute, only required that the person have been placed under arrest, not to have been lawfully arrested, it was constitutionally infirm.

This decision is consistent with at least one other decision of the United States Supreme Court. In *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 293 (1965), the Court held that while Pennsylvania had characterized its forfeiture statute as being civil and administrative, it was at least quasi-criminal; and, as such, the *Mapp* exclusionary rule applied.

In the hearing under Section 4511.191 (F) the Registrar need only prove that the officer had *reasonable grounds* to believe the person was driving while under the influence of alcohol. A person arrested by an officer upon

reasonable grounds – as opposed to probable cause – may have been arrested illegally. Certainly, the state may not predicate a driving suspension, even if it does not characterize the driving suspension as punishment, based upon illegal actions of its officers.

It would seem that this issue presents a substantial federal question and would require that O.R.C. Sec. 4511.191 be stricken as in conflict with the Constitution of the United States.

III.

The Exclusion of Essential Elements From the Hearing Does Not Meet The Constitutional Standards Established By This Court.

This Court's decision in *Bell* v. *Burson,* 402 U.S. 535 (1971), dealt with another consideration of Due Process. The Court also held that the hearing afforded must be "appropriate to the nature of the case," at 542, and that it may not exclude "consideration of an essential element of the decision whether (the) license . . . shall be suspended." at 541. The two essential elements which are excluded in the hearing under Section 4511.191 (F) are the statutory and constitutional rights to confer with counsel and the lawfulness of the request to take the chemical test.

Section 4511.191 (F) specifically delineates the scope of the hearing.

> "The scope of the hearing shall be limited to the issues of whether a police officer had reasonable grounds to believe the person had been driving a motor vehicle upon the public highways in this state while under the influence of alcohol, whether the person was placed under arrest, whether he refused to submit to the test upon the request of the officer, and whether he was advised of the consequences of his refusal."

Neither of the two issues we suggest are essential can validly be raised in the hearing.

Certainly, someone who has been arrested for the offense of driving while intoxicated has both a statutory and constitutional right to confer privately with counsel. Section 2935.20, Revised Code; *Argersinger* v. *Hamlin,* 407 U.S. 25 (1972). Since the State cannot predicate the suspension upon the state's violation of constitutional rights, *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 293 (1965), and since the scope of the trial as set out in the statute makes no provisions for asserting that the petitioner's rights were violated, an essential element of Due Process has been excluded.

Appellant sought to introduce evidence in regard to this issue, but it was stricken by the Judge. The *obiter dictum* of the Court of Appeals on page 6, of course, has no bearing. Either the State can exclude essential elements of Due Process or the State cannot. If it cannot, as *Bell* would require, the Statute must be struck down.

The second essential element partially overlaps the first. If the arrest was illegal, or if the person's rights to confer with counsel were violated, then certainly the request to take the chemical test would also be tainted. Further, suppose the chemical test chosen were a blood test and the person seeking to administer the test were not qualified? Suppose the person sought to use a dirty needle? Section 4511.191 (F) makes no provisions for the introduction of evidence on these crucial issues.

Section 4511.191 (F) excludes certain essential elements and therefore must be struck down as violating the Due Process Clause of the United States Constitution.

IV.

Statutes Which May Be Otherwise Constitutional May Be Applied In An Unconstitutional Manner.

Each of the two reported cases which has examined the constitutionality of Section 4511.191 since the United States Supreme Court's decision in *Bell* v. *Burson,* 402 U.S. 535 (1971), has *de facto* recognized that if the suspension were effective prior to the opportunity for a hearing the action would be constitutionally defective. *Fell* v. *Bureau of Motor Vehicles,* 30 Ohio App. 2d 151 (1972); *Bell* v. *Curry,* 68 O.O. 2d 109 (1974). As a result, they have reached the conclusion that the statute does not mandate such a result. Neither decision focused on the actions of the Appellee apart from the Statute.

The appellee in the instant case sent plaintiff a notice dated October 29, 1973, suspending plaintiff's driver's license "effective October 29, 1973." A copy of this suspension notice was sent to the Cincinnati Police Department.

For all practical purposes, as far as the Bureau of Motor Vehicles, the State of Ohio, and the Cincinnati Police Department were concerned, on October 29, 1973, and thereafter, the Plaintiff was driving on a suspended driver's license. He would be subject to arrest, the possibility of incarceration prior to the setting of bond, and anything else which attends an arrest situation.

Certainly laws which would otherwise be constitutional may be applied in an arbitrary manner. It is then the application which is stricken and not the statute itself. Such action would be consistent with the previous reported Court decisions and would seem to be required by them.

CONCLUSION

Appellant has demonstrated above that this Court has jurisdiction to hear this matter on appeal. The important federal questions were raised and decided below and this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-74475

JOHN A. WIETHE,
Plaintiff-Appellant,

vs.

C. DONALD CURRY, REGISTRAR,
Defendant-Appellee.

DECISION

(Filed March 24, 1975)

Mr. Marvin Kolstein, 607 Terrace Hilton Building, Cincinnati, Ohio 45202, for Plaintiff-Appellant,

Messrs. Simon L. Leis, Jr., Leonard Kirschner and Robert R. Hastings, Jr., 420 Hamilton County Courthouse, Cincinnati, Ohio 45202, for Defendant-Appellee.

PER CURIAM.

This cause came on to be heard upon the appeal, transcript of the docket and journal entires and original papers from the Hamilton County Municipal Court, transcript of the proceedings, the assignments of error, the briefs and arguments of counsel.

At approximately 12:15 A.M. on the morning of October 9, 1973, John Wiethe, the appellant herein, was traveling northbound on Interstate 75 at a rate of speed in excess of the posted limit. Patrolman Robert Lierman of the Cincinnati Police Department observed the appellant and caused the appeallant to stop his vehicle.

After asking the appellant for his driver's license, an accident occurred between the appellant's vehicle and the officer's police cruiser prompting the officer to call his supervisor, Sergeant Howard Mills, to the scene. Thereafter, based upon Officer Lierman's observations of the appellant's driving and his physical condition, the appellant was charged with speeding and driving under the influence of an alcoholic beverage.

The appellant was then transported in his own vehicle to a Cincinnati police station where he was permitted to summon his attorney. Once appellant's counsel arrived, the appellant expressed an unwillingness to undergo a "Breathalizer" test unless it was supervised by a police officer of a rank higher than that of Sergeant Mills, and unless a physician was present to take a contemporaneous blood test.

The appellant reiterated his reluctance to take the test, predicating his reluctance on his fear that the test would be improperly administered. Deeming appellant's requirements to constitute a refusal to take the "Breathalyzer" test, the police read to the appellant the Ohio Implied Consent Law and the ramifications of his refusal to take the test. Subsequently, the police forwarded the appropriate notice of such refusal to the Ohio Department of Motor Vehicles.

Thereafter, following a trial on charges of violation of R. C. 4511.19 in which appellant was found to be not guilty, the appellant was notified that his driver's license

was suspended, such suspension to begin upon the receipt by the Bureau of Motor Vehicles of appellant's license. In accordance with the provisions of that notice, the appellant filed a timely notice of appeal in the Hamilton County Municipal Court.

The cause was heard on August 7, 1974. At the conclusion of all the evidence and following the submission of supplemental memorandum briefs, the court ruled 1) that Section 4511.191, Ohio Revised Code is constitutional, and 2) that the appellant had failed to show any error on the part of the Registrar of the Bureau of Motor Vehicles. Whereupon, the appellant filed a timely notice of appeal to this Court.

Six assignments of error are presented for our review which will be considered in the order of their listing. The first assignment contains the assertion that Section 4511.191, O.R.C. is unconstitutional.

We preface our remarks on this assignment with the note that this statute has been judicially construed in Ohio and has repeatedly been found to be constitutional by the courts of this State, including its highest court. See, *State* v. *Starnes*, 21 Ohio St. 2d 38; *Bell* v. *Curry*, 68 Ohio Op. 2d 109. We are obviously not at liberty to re-examine this basic determination.

In particular support of his contention of the statute's unconstitutionality, the appellant argues that the statute provides for a deprivation of property prior to notice and a hearing, thereby denying the petitioner, the appellant herein, due process under the law.

This contention is without foundation. Section 4511.-19 (E) provides that: "If a person whose license, permit to drive, or nonresident operating privilege has been suspended, petitions for a hearing or appeals any decision which is adverse to him, *the suspension shall begin at*

the termination of any hearing or appeal unless the hearing or appeal resulted in a decision favorable to the person." (emphasis added) Therefore, if the person institutes any type of appellate procedure regarding the suspension, the suspension *can not* take effect until the appellate procedures have been exhausted.

In *Fell* v. *Bureau of Motor Vehicles*, 30 Ohio App. 2d 151, the Court of Appeals for Cuyahoga County held that:

> "This is only a condition or proposed suspension because if the licensee files a petition and requests a hearing, the suspension shall not begin until the hearing on the petition, or any appeal therefrom, is terminated unfavorably for the licensee. . . . Hence, under R. C. Section 4511.191 there will be a hearing and determination before the license is actually suspended unless no petition for hearing is filed."

By virtue of the Ohio Supreme Court's having dismissed an appeal taken from the above cited decision, we must assume that tacit approval has been accorded to it.

Accordingly, we hold that Section 4511.191, O.R.C. is constitutional, and appellant's first assignment of error is without merit.

In assignment number two, appellant contends that: Section 4511.191, if constitutional, was applied in an unconstitutional manner." The appellant maintains that through the letter sent to him by the Registrar, the appellant's driver's license was already under suspension, and had been effectively under suspension, since October 29, 1973.

For the reasons given in our consideration of appellant's first assignment of error, we conclude that appellant's license is not now under suspension, nor can it be under suspension until such time as all of the appellant's

appellate procedures have been exhausted. The second assignment of error is without merit.

Appellant argues in his third assignment of error that: "The Trial Court erred by not permitting appellant to amend his petition to conform to the evidence." The appellant incorporates into this argument the question of whether the "arresting officer" had in fact placed the appellant under arrest on the morning of October 9, 1973.

In spite of the fact that the petition was not amended to reflect the evidence adduced at the hearing, an examination of that evidence has convinced us that Officer Lierman had taken the appellant sufficiently under his control to have put the appellant on notice that he was under arrest. The testimony of Officer Lierman was that:

"Q Was Mr. Wiethe placed under arrest?

A Physically, did I say, 'I arrest you'? No.

Q Did you take him into custody?

A Yes. I had him in my control.

Q What charges was he taken under your control for?

A Speeding and driving under the influence of an alcoholic beverage."

While we agree with the holding of *Toledo* v. *Lowenberg*, 99 Ohio App. 165, that every stopping or detention of a person does not constitute an arrest, it is manifest from the facts before us that Officer Lierman had the requisite intent to arrest the appellant for speeding, and upon further investigation, to add the additional charge of driving while intoxicated. The officer's stopping of the appellant was clearly an arrest.

Therefore, the error of the Trial Court in failing to permit the amendment of the petition to conform to the

evidence was harmless. The third assignment of error is not well taken.

The appellant contends in his fourth assignment of error that: "The Trial Court erred in granting appellee's motion to strike paragraph (3 d) from appellant's petition." That paragraph reads: "That if the Plaintiff did refuse to submit to the test, it was upon the advice of his attorney, and that if Plaintiff follows the advice of his attorney he, therefore, does not come under the operation of Section 4511.191 of the Ohio Revised Code."

The contention raised herein is that the appellant was denied his statutory right to confer privately with counsel and to rely on the good faith advice of counsel not to take the "Breathalizer" test.

Whatever merit this argument might otherwise have, an examination of the record has failed to disclose any testimony on appellant's part, or other evidence, to the effect that his refusal to take the test was predicated upon the advice of counsel. On the contrary, appellant testified numerous times that his decision was predicated upon his own conclusion that the test would not be fairly administered because of acts and statements of the officers indicating a "prejudiced" attitude toward him. Appellant's failure to adduce any evidence from which it could properly be concluded that his reason for failing or refusing to take the test was founded on advice of counsel, necessarily removes this issue from our consideration. Moreover, while evidence was adduced tending to show that appellant and his counsel were not provided with a private room in which to confer, they were allowed to use a table in a corner of a room out of the earshot of Officers Lierman and Mills. Even if we were to hold that the right to confer with counsel attended these proceedings, we would not

view an accused's right to privately confer with counsel to require that he be provided with a private room.

Accordingly, appellant's fourth assignment is overruled.

Finally, in his fifth and sixth assignments of error, appellant argues that the judgment was contrary to the manifest weight of the evidence, and that appellant was not accorded that due process of law guaranteed him by the United States Constitution where he was precluded from designating an alcohol test of his own choosing. We elect to consider these assignments together because of their overlapping character.

In the determination of the first of these issues, our review is necessarily circumscribed by the holding in *State* v. *Starnes,* supra, the second syllabus of which is as follows:

> "2. Section 4511.191 (F), Revised Code, does not violate the due process clause of the Fourteenth Amendment to the United States Constitution by permitting suspension of a person's driver's license upon proof less than proof beyond a reasonable doubt that (1) a police officer had reasonable ground to believe the person had been driving a motor vehicle upon the public highways in this state while under the influence of alcohol (2) the person was placed under arrest (3) the person refused to submit to a chemical test upon request of the officer and (4) the person was advised of the consequences of his refusal. Proceedings under Section 4511.191 (F), Revised Code, are civil and administrative in nature and are intended for the protection of the travelling public, and are independent of any criminal proceedings which may be instituted pursuant to other statutes or ordinances."

Thus, if the record reveals credible evidence of probative value on each of the four elements of proof set forth above, we take it that the judgment of the trial

court may not be said to be contrary to the manifest weight of the evidence, nor was it contrary to law, nor generally may it be said to conflict with requirements of due process of law, even where, as here, the appellant was acquitted of the separate criminal offense of driving while intoxicated growing out of the same incident giving rise to the Section 4511.191, Revised Code proceedings.

With respect to much of appellant's argument, we are constrained to point out that this Court is not free to indulge its own reasoning or rationale unless we are able to honestly conclude that the issue is one to which superior authority has not addressed itself. Where the Supreme Court has directly spoken to an issue, as here, debate is precluded, at this level, at least.

Examining the record against the *Starnes* criteria, we conclude that there was credible evidence which, if believed by the trier of facts, would support a finding: (1) that Officer Lierman had reasonable grounds to believe that the appellant was operating an automobile on a public highway while under the influence of alcohol, and that this determination is not necessarily animadverted by a subsequent failure to secure a conviction by proof beyond a reasonable doubt in a separate but related criminal charge; (2) that the appellant was placed under arrest, although these actual words were not used, where his liberty was restrained and he was taken into custody by Officers Lierman and Mills; (3) that appellant's willingness to take psychomotor tests *in lieu of* the breath test authorized by statute and regulations, whether or not his apprehensions in connection therewith were well founded, constituted a refusal to submit to a chemical test upon request of the officer; and (4) the appellant was advised of the consequences of his refusal to take the chemical test.

The foregoing determinations dictate our overruling of appellant's fifth and sixth assignments of error, and our affirmance of the judgment below.

The judgment is accordingly affirmed.

SHANNON, P.J., PALMER and STRAUSBAUGH, J.J.

STRAUSBAUGH, J., OF THE TENTH APPELLATE DISTRICT, SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX B

HAMILTON COUNTY MUNICIPAL COURT
HAMILTON COUNTY, OHIO

No. 180378

JOHN A. WIETHE,
Plaintiff-Appellant,

vs.

C. DONALD CURRY,
Defendant-Appellee.

DECISION

(Filed ————)

This matter came on for hearing before the Court on August 7, 1974, on the Complaint, Answer and Evidence and, at the request of plaintiff-appellant, was taken under submission pending briefs which were subsequently filed.

The Court, after hearing and consideration, finds as follows:

A) Section 4511.191 O.R.C., the implied consent statute is constitutional.

B) Plaintiff-appellant has failed to show any error in the action of defendant-appellee.

WHEREFORE, it is ordered, adjudged and decreed that this case be dismissed at plaintiff-appellants costs.

Exceptions to plaintiff-appellant noted.

Appearances:

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Attorney for Plaintiff-Appellant
607 Terrace Hilton Building
Cincinnati, Ohio 45202

Simon Leis, Jr.
Leonard Kirschner
Robert Hastings
Attorneys for Defendant-Appellee
Hamilton County Courthouse
Cincinnati, Ohio 45202

/s/ JOHN P. O'CONNOR
John P. O'Connor, Judge

August 30, 1974

Approved and Filed for Journalization Aug. 30, 1974 — Entered Aug. 30, 1974 — Minute 7043

APPENDIX C

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-74475

JOHN A. WIETHE,
Appellant,

vs.

C. DONALD CURRY, REGISTRAR,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed September 16, 1975)

Notice is hereby given that John A. Wiethe, Appellant, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Ohio entered on June 27, 1975, dismissing the appeal of Appellant from the final judgment of this Court entered on March 24, 1975.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

/s/ MARVIN N. KOLSTEIN,
Attorney for Appellant,
607 Terrace Hilton Bldg.,
Cincinnati, Ohio 45202
513 241 7332

APPENDIX D

IN THE SUPREME COURT OF OHIO

No. 75-341

JOHN A. WIETHE,

Appellant,

vs.

C. DONALD CURRY, REGISTRAR,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed September 15, 1975)

Notice is hereby given that John A. Wiethe, Appellant, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Ohio entered on June 27, 1975, dismissing the appeal of Appellant from the final judgment of the Court of Appeals, First Appellate District of Ohio, entered on March 24, 1975.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257 (2).

/s/ MARVIN N. KOLSTEIN
Attorney for Appellant
607 Terrace Hilton Bldg.
Cincinnati, Ohio 45202
513/241-7332

APPENDIX E

THE SUPREME COURT OF THE STATE OF OHIO
1975 TERM

To wit: June 27, 1975

THE STATE OF OHIO,)
) No. 75-341
CITY OF COLUMBUS.)

JOHN A. WIETHE,

Appellant,

vs.

C. DONALD CURRY,

Appellee.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR HAMILTON COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:
Motion Fee, $20.00, paid by MARVIN N. KOLSTEIN

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....

..... Clerk
..... Deputy

APPENDIX F

THE SUPREME COURT OF OHIO
1975 TERM
To wit: June 27, 1975

THE STATE OF OHIO,)
) No. 75-341
CITY OF COLUMBUS.)

JOHN A. WIETHE,
Appellant,

vs.

C. DONALD CURRY,
Appellee.

APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....

..... Clerk
..... Deputy

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ-73-163 Phx WEC

ERENST CASTANEDA CHAVEZ,
Plaintiff,

vs.

DAVID H. CAMPBELL, Superintendent, Motor Vehicle Division, Arizona Highway Department,
Defendant.

OPINION

(Filed July 2, 1973)

W. J. Fusteneau, Clerk
United States District Clerk for the District of Arizona
By /s/ P. L. Martin, Deputy Clerk

Before TRASK, Circuit Judge, and CRAIG and MUECKE, District Judges.

CRAIG, District Judge

On February 1, 1973, plaintiff was driving his automobile on a public street in Phoenix, Arizona, and was arrested and charged with a violation of A.R.S. § 28-721 (A), failure to drive on the right side of the roadway, and with violation of A.R.S. § 28-692, driving while under the influence of intoxicating liquor (DWI). Pursuant to A.R.S. § 28-691, Arizona's implied consent law, the arresting officer requested the plaintiff to submit to a breath

test to determine whether the plaintiff was under the influence of alcohol. Plaintiff refused to submit to the test and requested permission to telephone and consult with an attorney, which request was denied by the officer. On February 7, 1973, defendant, under the provisions of the implied consent law, summarily suspended plaintiff's driver's license for a period of six months from February 6, 1973. This suspension was done without affording plaintiff an opportunity to be heard. In an administrative hearing held on March 16, 1973, defendant's action was sustained.

Plaintiff brings this action under 42 U.S.C. § 1983 and invokes this Court's jurisdiction under 28 U.S.C. § 1343. He attacks the constitutionality of A.R.S. § 28-691 on three grounds: 1) the statute denies him due process of law; 2) the statute is violative of the equal protection of the laws, and 3) the statute is invalid because a suspect requested to submit to the test is not permitted the assistance of counsel prior to the rendition of a decision to suspend.

A Three-Judge Court was convened pursuant to 28 U.S.C. §§ 2281 and 2284, as plaintiff contends that the implied consent law be declared unconstitutional, and that defendant be enjoined from enforcing the provisions of that statute against him.

Before we can reach the issues presented in this case, we must first resolve defendant's motion for partial abstention. Defendant argues that portions of the implied consent statute have not yet been construed by the Arizona Supreme Court. Defendant readily acknowledges that the statute has twice been construed in significant part by the Arizona Supreme Court in *Campbell* v. *Superior Court,* 106 Ariz. 542, 479 P. 2d 685 (1971), and in *Campbell* v. *Superior Court,* 107 Ariz. 330, 487 P. 2d 397 (1971). In *Campbell (I)* it was held, *inter alia,* that a suspect does not have a

right to an administrative hearing prior to the effective date of suspension of his license, and that a suspect does not have the right to consult with an attorney at the time he is requested to submit to a breath test. *Campbell (II)* declared that the entry of a plea of guilty by a non-counsenter to the charge out of which the license suspension arose did not relieve him from the consequences of his refusal under the Act.

The case before us, then, is not one where provisions of a state statute have not previously been construed. *See, e.g., Fornaris* v. *Ridge Tool Co.*, 400 U. S. 41 (1970). The doctrine of abstention is to be invoked when a state law is susceptible of a "construction by the state courts that would avoid or modify the constitutional question." *Zwickler* v. *Koota*, 389 U. S. 241, 249 (1967); *Reetz* v. *Bozanich*, 297 U. S. 82 (1970). The doctrine does not apply where state law is settled or else where the statute is unconstitutional no matter how it may be construed by the state courts. *Harman* v. *Forssenius*, 380 U. S. 528 (1965). Here we have a statute that has twice been construed by the Arizona courts, and which constructions are the very object of plaintiff's attack. Indeed, defendant has conceded that those sections of the statute already construed are ripe for a constitutional determination by this Court. Accordingly, we conclude that partial abstention is inappropriate to the instant case.

We note at the outset that the implied consent laws in many states have come under increasing attack. In addition to the Arizona Supreme Court, several other state courts of last resort have upheld the constitutionality of their states' statutes. See *In re McClain*, 506 P. 2d 1204 (N.M. 1973); *Broughten* v. *Warren*, 281 A. 2d 625 (Del. 1971); *Craig* v. *Commonwealth of Kentucky*, 471 S. W. 2d 11 (Ky. 1971). By contrast, a Three-Judge Federal Court

in South Dakota has found that state's statute invalid. *Holland* v. *Parker,* 354 F. Supp. 196 (D. S. D. 1973).

To reach a determination of the present cause, we need go no further than *Bell* v. *Burson,* 402 U. S. 535 (1971) and *Fuentes* v. *Shevin,* 407 U. S. 67 (1972). In *Bell* v. *Burson, supra,* the United States Supreme Court held the Georgia Motor Vehicle Safety Responsibility Act unconstitutional on the grounds that "* * * since the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his license, the State may not, consistent with due process, eliminate consideration of that factor in its prior hearing." 405 U. S. at 541. En route to its holding, the Court made various important declarations concerning due process and the revocation of drivers' licenses.

> "Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment (Citations omitted). This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege'." (Citations omitted) 402 U.S. at 539. The Court then went on to state, 402 U.S. 542:
>
> "While '[m]any controversies have raged about * * * the Due Process Clause,' *ibid.,* it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination becomes effective." (Citations omitted)

The meaning of the phrase "emergency situations" was clarified by the Court in *Fuentes* v. *Shevin, supra,* at 90-92:

> "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. Boddie v. Connecticut, 401 U. S., at 379. These situations, however, must be truly unusual. Only a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food." (Footnotes omitted)

The cases cited above which have upheld the constitutionality of the implied consent statutes have done so on the grounds that there is a compelling State interest to keep drunk drivers off the road, and to get them off immediately. Thus, the drunk driver episode is characterized as an "emergency situation" which justifies summary revocation of drivers' licenses without prior notice and hearing. Defendant not only reaffirms these arguments, but goes beyond to argue that those who refuse to take a breath test are, by that very fact, dangerous drivers who must be removed from the road.

It cannot be denied that there is a compelling State

interest to protect the public from drunk drivers. However, the effect of the implied consent law is not to remove drunks from the road, but rather to remove only those who have refused to submit to the test. Thus, a drunk who takes the breath test continues to drive and keeps his license, while a driver who may be completely sober, and who refuses to take the test finds himself excluded from the highways. As a result, the statute does not further any compelling State interest to remove drunks from the road. The vitality of the defendant's argument is further vitiated by the stipulated record which shows that, as a practical matter, the Drivers' License Branch of the Motor Vehicle Division of the Arizona Highway Department does not ordinarily suspend an individual's Arizona driver's license upon receipt of a first conviction for DWI, although it has the discretion of doing so under A.R.S. § 28-446 (A) (8). A first time DWI offender need merely take the breath test, and even if he is later convicted, he will continue to occupy the highways, although the argument is advanced that it is this very same drunk driver whom the state is attempting to remove from the roads through the implied consent law. Even if the state were to revoke the licenses of *all* persons convicted of DWI, so long as the suspect submits to the test, the revocation will not take place until later, following conviction on the charge upon a full trial and hearing. This, indeed, militates against the asserted argument that summary suspension of licenses is necessary to facilitate immediate removal of drunks from the road. "If there is time to permit prerevocation adjudication for the driver found presumptively under the influence of alcohol, then there is no reason why the same opportunity should not be afforded the driver who refuses the test." *Holland* v. *Parker, supra,* at 202. Finally, there is no data to demonstrate satisfac-

torily to this Court that an individual is a dangerous driver and a threat on the highways merely because he refuses to take a breath test.

We conclude that defendant has failed to justify the summary revocation of a driver who has refused to take the test, as was the case with plaintiff here, and we find that A.R.S. § 28-691 (1969) is unconstitutional pursuant to *Bell* v. *Burson, supra,* because it permits the revocation of driving privileges without affording prior notice and hearing. As we have reached our decision on due process grounds, we do not consider plaintiff's equal protection and right to counsel arguments. Injunction will issue.

DATED this 15th day of June, 1973.

/s/ OZELL M. TRASK
United States Circuit Judge

/s/ WALTER B. CRAIG
United States District Judge

/s/ C. C. MUECKE
United States District Judge

APPENDIX H

STATUTES

[§ 4511.19.1] § 4511.191 Implied consent.

(A) Any person who operates a motor vehicle upon the public highways in this state shall be deemed to have given consent to a chemical test or tests of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if arrested for the offense of driving while under the influence of alcohol. The test or tests shall be administered at the direction of a police officer having reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways in this state while under the influence of alcohol. The law enforcement agency by which such officer is employed shall designate which of the aforesaid tests shall be administered.

(B) Any person who is dead, unconscious, or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn consent provided by division (A) of this section and the test or tests may be administered, subject to sections 313.11 to 313.16, inclusive, of the Revised Code.

(C) Any person under arrest for the offense of driving a motor vehicle while under the influence of alcohol shall be advised at a police station of the consequences of his refusal to submit to a chemical test designated by the law enforcement agency as provided in division (A) of this section. The advice shall be in a written form prescribed by the registrar of motor vehicles and shall be read to such person. The form shall contain a statement that the form was shown to the person under arrest and read to him

in the presence of the arresting officer and one other police officer or civilian police employee. Such witnesses shall certify to this fact by signing the form.

(D) If a person under arrest for the offense of driving a motor vehicle while under the influence of alcohol refuses upon the request of a police officer to submit to a chemical test designated by the law enforcement agency as provided in division (A) of this section, after first having been advised of the consequences of his refusal as provided in division (C) of this section, no chemical test shall be given, but the registrar of motor vehicles, upon the receipt of a sworn report of the police officer that he had reasonable grounds to believe the arrested person had been driving a motor vehicle upon the public highways of this state while under the influence of alcohol and that the person refused to submit to the test upon the request of the police officer and upon the receipt of the form as provided in division (C) of this section certifying that the arrested person was advised of the consequences of his refusal, shall suspend his license or permit to drive, or any nonresident operating privilege for a period of six months, subject to review as provided in this section; or if the person is a resident without a license or permit to operate a motor vehicle in this state, the registrar shall deny to the person the issuance of a license or permit for a period of six months after the date of the alleged violation.

(E) Upon suspending the license or permit to drive or non-resident operating privilege of any person, as provided in division (D) of this section, the registrar shall immediately notify the person in writing, at his last known address, and inform him that he may petition for a hearing as provided in division (F) of this section. If a person whose license, permit to drive, or nonresident operating

privilege has been suspended, petitions for a hearing or appeals any decision which is adverse to him, the suspension shall begin at the termination of any hearing or appeal unless the hearing or appeal resulted in a decision favorable to the person.

(F) Any person whose license or permit to drive or nonresident operating privilege has been suspended under this section, may, within twenty days of the mailing of the notice provided above, file a petition in the municipal court or the county court, or in case such person is a minor in the juvenile court, in whose jurisdiction such person resides or in whose jurisdiction the arrest occurred if such person is not a resident of this state, agreeing to pay the cost of the proceedings and alleging error in the action taken by the registrar of motor vehicles under division (D) of this section or in one or more of the matters within the scope of the hearing as provided in this section, or both. Such petitioner shall notify the registrar of the filing of the petition and send him a copy. The scope of such hearing shall be limited to the issues of whether a police officer had reasonable ground to believe the person had been driving a motor vehicle upon the public highways in this state while under the influence of alcohol, whether the person was placed under arrest, whether he refused to submit to the test upon request of the officer, and whether he was advised of the consequences of his refusal.

(G) The registrar shall furnish the court a copy of the registrar's affidavit as provided in division (C) of this section.

In hearing the matter and determining whether such person has shown error in the action taken by the registrar of motor vehicles under division (D) of this section, the court shall decide such issue upon the registrar's certified affidavit and such additional relevant, competent, and ma-

terial evidence as either the registrar or the person whose license is sought to be suspended submits.

In such proceedings the registrar shall be represented by the prosecuting attorney of the county where such person resides.

If the court finds from the evidence submitted that such person has failed to show error in the action taken by the registrar of motor vehicles under division (D) of this section or in one or more of the matters within the scope of the hearing as provided in division (F) of this section, or both, then the court shall assess the cost of such proceeding against such person and shall impose the suspension provided in division (D) of this section. If the court finds that such person has shown error in the action taken by the registrar of motor vehicles under division (D) of this section or in one or more of the matters within the scope of the hearing as provided in division (F) of this section, or both, the cost of the proceedings shall be paid out of the county treasury of the county in which the proceedings were held, and the suspension provided in division (D) of this section shall not be imposed. The court shall give information in writing of the action taken to the registrar of motor vehicles.

(H) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this state has been suspended, the registrar shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he has a license.

Supreme Court, U. S.
FILED
OCT 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-467

JOHN A. WIETHE

Appellant,

vs.

C. DONALD CURRY, REGISTRAR,

Respondent.

On Appeal From The Supreme Court of Ohio

MOTION OF APPELLEE TO DISMISS APPEAL

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTIONAL STATEMENT	2
STATUTES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT:	
I. Ohio Revised Code Section 4511.19.1 should be found to be unconstitutional because it provides for a deprivation of property without due process.	7
II. Ohio Revised Code Section 4511.19.1 is unconstitutional since it does not require a person to have been lawfully arrested prior to his being asked to submit to the chemical test.	10
III. The exclusion of essential elements from the hearing does not meet the constitutional standards established by this Court.	12
IV. Statutes which may be otherwise constitutional may be applied in an unconstitutional manner.	14
CONCLUSION	15

Page

APPENDIX A

Decision of Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio 1a

APPENDIX B

Ohio Revised Code, Sec. 4511.191 ..... 10a

APPENDIX C

Opinion of Hamilton County Municipal Court in Case No. 163586, James R. Bell, Plaintiff v. C. Donald Curry, Registrar, Bureau of Motor Vehicles, Defendant 14a

TABLE OF AUTHORITIES

Cases:

Bell v. Burson, 402 U.S. 535 ..... 7, 8, 9
Bell v. Curry, 68 O.O.2d 109, at 111 ..... 9, 15
Fell v. Bureau, 30 O.A.2d 151, at 158 ..... 8, 15
Holland v. Parker, 354 F. Supp. 196 11
State ex rel. King v. Shannon, 170 O.S. 393, at 394 .. 10, 12

Statutes:

Ohio Revised Code, Section 4511.19.1 ..... 2, 9
Title 28, U.S.C., Section 1257 10

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-467

JOHN A. WIETHE

Appellant,

vs.

C. DONALD CURRY, REGISTRAR,

Respondent.

On Appeal From The Supreme Court of Ohio

MOTION OF APPELLEE TO DISMISS APPEAL

Now comes the said Appellee, C. Donald Curry, Registrar for the Bureau of Motor Vehicles of the State of Ohio by and through his attorneys Simon L. Leis, Jr., Prosecuting Attorney of Hamilton County, Ohio, and Leonard Kirschner and Robert R. Hastings, Jr., Assistant Prosecuting Attorneys of Hamilton County, Ohio, and respectfully move this Court for an Order Dismissing the Appeal for the reason that there has been no denial of appellant's constitutional rights in the proceedings below as reflected in the record of trial proceedings and the opinions and rulings of the Court of Appeals and the Supreme Court of Ohio.

OPINIONS BELOW

The brief of the Appellant correctly cites the opinion and judgments below. The opinion the Court of Appeals of the First Appellate District is unreported but is reproduced and attached as Appendix A.

JURISDICTIONAL STATEMENT

This is an appeal by appellant from the Order of the Supreme Court of Ohio entered on June 27, 1975, which dismissed their appeal for the reason that no substantial constitutional questions were presented nor matters of great public importance presented.

STATUTES INVOLVED

The statute involved in this case is Ohio Revised Code 4511.19.1 which is set forth in its entirety at Appendix B of this Brief.

QUESTIONS PRESENTED

The appellants have raised four questions in this appeal which are:

(1) Whether O.R.C. Section 4511.19.1 which permits the Registrar of the Ohio Bureau of Motor Vehicles to suspend the drivers license of an individual prior to his being given notice and an opportunity for a hearing violates the due process of the Fourteenth Amendment?

(2) Whether O.R.C. Section 4511.19.1 violates the Fourth and Fifth Amendments as applied to the States by the Fourteenth Amendment by not requiring as a pre-condition for its applicabil-

ity the lawful arrest of the person whose licenses sought to be suspended?

(3) Whether O.R.C. Section 4511.19.1 which excludes essential elements of due process from the hearing on appeal of the suspension of a person's drivers license violates the due process clause of the Fourteenth Amendment?

(4) Whether assuming the suspension mandated by O.R.C. Section 4511.19.1 is not effective prior to notice and an opportunity for a hearing, the action of the Registrar suspending the license of Appellant prior to notice and an opportunity for a hearing violates the due process clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

The statement of facts of this case reflect that the Plaintiff-Appellant was operating his motor vehicle in the north bound direction on the expressway (R 10) at approximately 12:15 A.M. at a rate of speed of 84 m.p.h. in a 65 mile an hour zone (R 89, 90). The officer proceeded to stop the vehicle which pulled over to the Hopple Street exit of the expressway (R 90), at which time the officer arrested Plaintiff-Appellant by taking him into custody on the charge of speeding and driving while under the influence of alcoholic beverages (R 91). The officer testified with regard to the condition of the Plaintiff-Appellant that he walked with a sway (R 92), that he had occasion to smell his breath and that there was a moderate to strong odor of alcohol on his breath (R 92), and that the Plaintiff-Appellant admitted having two high balls between a period of 11:00 P.M. and 12:15 A.M.

(R 92), and that the Plaintiff-Appellant's mannerisms appeared slow and his face was red and he was extremely nervous (R 94), and that his eyes were bloodshot and watery (R 92). The officer then testified that based upon his observations of the Plaintiff-Appellant and the manner in which he was driving and the above observations; in light of his experiences, the Plaintiff-Appellant was operating his motor vehicle while under the influence of alcohol. The officer also said that he took the Plaintiff-Appellant into custody for the charges of driving while under the influence of an alcoholic beverage (R 91), which statement was further corroborated by Officer Mills on page 128 of the record wherein Officer Mills stated:

"Where he was under arrest by Officer Lierman"

Plaintiff-Appellant on page 25 amongst several other places in the record admitted that he was under arrest when he stated:

"I did not think he had reasonable grounds to arrest me."

The testimony further reflected that the Plaintiff-Appellant called his attorney; who was at the Police Station within thirty minutes of the time the call was made. Testimony was further shown that the plaintiff-appellant refused to take the breathalizer test unless certain conditions were met, namely, that he had a superior officer present and a doctor of his own choosing present to take a blood test (R 67). The record further reflected that he could not reach either of his own doctors to have them present. The record of the proceedings has several other basic statements reflecting that the plaintiff-appellant refused to take the test unless certain other personal conditions were met as reflected in other portions of his testimony

and in the testimony of Officer Lierman and Sergeant Mills. Upon the plaintiff-appellant's refusal to take the test he was read and shown the form prescribed by statute and warned of the consequences of his refusal.

It is to be further pointed out that the form which is part of the dockets, records and journal entries in this matter specifically says:

> "You are now under arrest for driving a motor vehicle while under the influence of alcohol . . ."

Private counsel of the said Plaintiff was with and conferred with the Plaintiff-Appellant during the entire period of the proceedings as reflected by the testimony from approximately 1:30 A.M. in the morning.

In accordance with the law in the State of Ohio the Appellee-Registrar of the Bureau of Motor Vehicles sent the appellant a notice that his license would be suspended for a period of six months for failure to comply with Ohio Revised Code 4511.19.1 unless he filed an appeal in the Municipal Court within twenty (20) days within the date of the mailing of said letter. In accordance with the notification by the Registrar of the Bureau of Motor Vehicles the appellant in these proceedings filed his appeal to the Hamilton County Municipal Court and all suspension proceedings were stayed as against him.

After a hearing at which evidence was presented the Hamilton County Municipal Court Judge determined that Ohio Revised Code 4511.19.1 was constitutional and that the Appellant in these proceedings had refused to take the test as provided by law and thereupon suspended the appellant's driving rights in the State of Ohio for a period of six (6) months. The Appellant in these proceedings filed a timely Notice of Appeal to the Court of Appeals of the First Appellate District which auto-

matically stayed any suspension of his driving rights in accordance with the provisions of Ohio Revised Code 4511.19.1.

In the appeal to the Court of Appeals of the First Appellate District of Hamilton County, Ohio, the appellant cited six Assignments of Error which were:

I. OHIO REVISED CODE SECTION 4511.19.1 IS UNCONSTITUTIONAL.

II. SECTION 4511.19.1, IF CONSTITUTIONAL, WAS APPLIED IN AN UNCONTITUTIONAL MANNER.

III. THE TRIAL COURT ERRED BY NOT PERMITTING APPELLANT TO AMEND HIS PETITION TO CONFORM TO THE EVIDENCE.

IV. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO STRIKE PARAGRAPH 3-d FROM APPELLANT'S PETITION.

V. THE TRIAL COURT'S JUDGMENT IS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

VI. THE SUSPENSION OF APPELLANT'S LICENSE FOR REFUSAL TO TAKE THE BREATHALYZER TEST WHEN HE OFFERED TO TAKE OTHER CHEMICAL TESTS VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

The Court of Appeals of the First Appellate District after hearing arguments of counsel rendered their decision on or about March 24th, 1975, (See Appendix A) in which they affirmed the suspension of the Plaintiff-Appellant's driving rights.

The Plaintiff-Appellant filed a timely Notice of Appeal to the Supreme Court of Ohio which in effect stayed any suspension of his driving rights pending that appeal. The Supreme Court of Ohio denied jurisdiction on or about June 27th, 1975. Defendant-Appellant then endeavored to go to the United States District Court for the Southern District of Ohio by way of declaratory judgment proceedings, etc. This proceeding was subsequently dismissed without a hearing on the merits by the Plaintiff-Appellant and a Notice of Appeal was filed to this Court.

ARGUMENT

I.

OHIO REVISED CODE SECTION 4511.19.1 SHOULD BE FOUND TO BE UNCONSTITUTIONAL BECAUSE IT PROVIDES FOR A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS.

At the outset let it be understood that we heartily concur with the general proposition that there cannot be a deprivation of a substantial right without due process of law. We believe that the statute of the State of Ohio on its face and as interpreted by the Ohio Courts clearly fall within the guidelines of this Court as pronounced in the case of *Bell* v. *Burson* as reported in 402 U.S. 535.

It is respectfully submitted that in every case cited by the Plaintiff-Appellant in these proceedings where the statute has been determined to be unconstitutional there has been determined to have been an immediate suspension of a driving right without any opportunity of hearing or contesting the matters involved until sometime substantially in the future. Pending that determination at some substantial date in the future the driving right had been suspended. In light of the pronouncement of this Court as reflected in *Bell* v. *Burson,* ibid., we respectfully submit that the cases cited by the Plaintiff-Appellant in these proceedings were properly decided. However, what Plaintiff-Appellant has not reflected is the fact that in Ohio the suspension of the driving rights does not begin to run until such time as the person whose license is being sought has had his opportunity of his hearing and any appellate proceedings thereon. In the State of Ohio under the current statute as it currently exists the driver does not even have to post any type of bond after his initial hearing while the matter is pending further appellate review. The Court of Appeals for Cuyahoga County which is the highest Court of direct appeal as of right in matters emanating from the Municipal Court in the case of *Fell* v. *Bureau* as reported in 30 O.A. 2d 151 at page 158 specifically held:

> "The Supreme Court of the United States has held that procedural due process of the Fourteenth Amendment requires that notice and opportunity for a hearing must be given before a driver's license can be suspended. *Bell* v. *Burson* (1971), 402 U.S. 535; *Jennings* v. *Mahoney* (1971), 404 U.S. 25. R. C. 4511.19.1 (E) complies with this requirement and therefore the due process argument raised by the plaintiff is not well taken."

We respectfully submit that the following is a quote from Ohio Revised Code, Section 4511.19.1 Section E:

> ". . . the suspension shall begin at the termination of any hearing or appeal unless the hearing or appeal resulted in a decision favorable to the person." (person refers to the driver whose license is being sought to be suspended.)

In another case; the Hamilton County Municipal Court rendered a well-reasoned decision interpreting the Ohio statute as reflected by *Bell* v. *Burson,* ibid., to be constitutional. We have attached a copy of that opinion as our Appendix C.

The Court specifically held in the case of *Bell* v. *Curry* as reported in 68 O.O. 2d 109 at 111:

> "It is the belief of this Court that Ohio's statutory provision affording the opportunity of a hearing to the aggrieved party without the loss of any rights pending the hearing and full determination of the issues raised clearly does not violate any due process requirements of the United States Constitution or the Constitution of the State of Ohio."

We therefore respectfully believe that Ohio Revised Code 4511.19.1 is constitutional on its face and is constitutional as interpreted by the Courts of Ohio which interpretations were prior to the case currently before this Court.

II.

OHIO REVISED CODE SECTION 4511.19.1 IS UNCONSTITUTIONAL SINCE IT DOES NOT REQUIRE A PERSON TO HAVE BEEN LAWFULLY ARRESTED PRIOR TO HIS BEING ASKED TO SUBMIT TO THE CHEMICAL TEST.

We respectfully submit that this allegation of alleged error is improper on two basic grounds. It is always and has always been a fundamental principle both in the State of Ohio and in the Supreme Court of the United States that you cannot raise in the Supreme Court matters which were not raised at the first opportunity, namely, in the trial Court or on the first right of appeal.

The Supreme Court of Ohio in the case of *State ex rel. King* v. *Shannon* as reported in 170 O.S. 393 at page 394 held:

> "It is an established rule of long-standing in this state that a constitutional question either in a civil or a criminal action, cannot be raised in the Supreme Court unless it was presented and urged in the Court's below."

This general principle of law has been codified with regard to the jurisdiction of this Court under Title 28 U.S.C., Section 1257.

Under the procedures and pronouncements of the Supreme Court of the State of Ohio the alleged allegations of error as set forth in alleged errors before this Court were never raised or presented either in the trial court or in the Court of Appeals of the First Appellate District being the Court of direct appellate review. We have specifically set forth in our Statement of the Facts the Assignments of Error which were raised on direct ap-

peal which indicates this matter was never relied on in the lower court. A reading of the briefs of counsel both in the Hamilton County Municipal Court and in the Court of Appeals of the First Appellate District would substantiate the fact that this issue was never raised in that Court.

However, even if this were a valid issue to be determined by this Court; which we feel it is not in light of the failure to have raised this matter at the first opportunity, we respectfully submit that the law as interpreted by the Ohio Courts still clearly reflect that the statute is constitutional. The record of the proceedings of the initial trial in this matter clearly reflect that over 50 pages of testimony was given relative to the validity of the arrest. In the course of the proceedings the plaintiff-appellant admits that he had been arrested and that he had been tried in other proceedings on the driving while under the influence charge. The basic issue is the validity of the arrest and not the determination as to whether or not the defendant is guilty or innocent of the charges for which he has been arrested. As indicated the Court took over 50 pages of testimony relative to the validity of the arrest itself. Therefore, even if the pronouncements in the case of *Holland* v. *Parker* as reported in 354 F. Supp. 196 were valid and binding; which they are not upon this Court, we respectfully submit that the Ohio Statute and the procedures undertaken in this case clearly fell within the gundelines set forth in this case.

Accordingly for the reason that the alleged error number II was not raised at the trial court level or on direct appeal and for the further reason that the Ohio Court in this case in its interpretation of the Ohio law went to the validity of the arrest; we respectfully submit that this alleged error is without merit.

III.

THE EXCLUSION OF ESSENTIAL ELEMENTS FROM THE HEARING DOES NOT MEET THE CONSTITUTIONAL STANDARDS ESTABLISHED BY THIS COURT.

Once again we respectfully submit that matters which were not raised at the trial court level nor on direct appeal cannot be raised either in the Supreme Court of Ohio as reflected in the *State ex rel. King* v. *Shannon,* ibid, or in the United States Supreme Court as reflected in the United States Code Section 1257, ibid. We respectfully direct this Court's attention to the assignments of error raised in the Court of Appeals of the First Appellate District which would clearly reflect that this specific issue was never raised in the Court of Appeals of the First Appellate District as a violation of any constitutional rights, etc. The closest thing to the raising of this issue was the Assignment of Error No. IV as raised in the Court of Appeals being:

> "THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION TO STRIKE A PORTION OF PARAGRAPH 3 IN THE ORIGINAL PETITION."

At no time did the Plaintiff-Appellant ever indicate in his Assignment of Error to the Court of Appeals for the First Appellate District that there was a violation of his constitutional rights or that the statute in question was unconstitutional by virtue of its limiting the issues to be heard at said hearing. However, once again we respectfully submit that even if this issue was raised which it wasn't, the record of the proceedings will clearly show that the allegation of alleged error are without merit.

The testimony in this case clearly reflected that the Plaintiff-Appellant in these proceedings was well-versed in the law and that within less than 30 minutes from the time he was brought to the police station he had an attorney present at his side at all times.

The Court of Appeals after going through the voluminous record of the proceedings reflected in their opinion:

> "The contention raised herein is that the Appellant was denied his statutory rights to confer privately with counsel and to rely on the good faith advice of counsel not to take the 'breathalizer' test.
>
> Whatever merit this argument might otherwise have, an examination of the record has failed to disclose any testimony on appellant's part, or other evidence, to the effect that his refusal to take the test was predicated upon the advice of counsel. On the contrary, appellant testified numerous times that his decision was predicated upon his own conclusions that the test would not be fairly administered because of acts and statements of the officers indicating a 'prejudiced' attitude toward him. Appellant's failure to adduce any evidence from which it could properly be concluded that his reason for failing or refusing to take the test was founded on advice of counsel, necessarily removes this issue from our consideration. Moreover, while the evidence was adduced tending to show that appellant and his counsel were not provided with a private room in which to confer, they were allowed to use a table in a corner of a room out of ear shot of officers Lierman and Mills. Even if we were to hold that the right to confer with counsel attended these proceedings, we would not view an accused right to privately confer with counsel to require that he be provided with a private room."

We therefore respectfully request that the alleged error number three is without merit for the reason that it

was not raised at the initial trial level nor on direct appeal and therefore it is not appropriate for this Court to undertake said matter on direct appeal or on certiorari. We further respectfully submit that even if it was properly raised that the record of the proceedings and the rulings of the Court below clearly refute the allegations of the Plaintiff-Appellant in this matter.

IV.

STATUTES WHICH MAY BE OTHERWISE CONSTITUTIONAL MAY BE APPLIED IN AN UNCONSTITUTIONAL MANNER.

We would heartily agree with this general statement of the law. However, we respectfully disagree with the allegations of alleged facts as set forth in the brief which are not born out by the record of the proceedings and pleadings in this matter. The record clearly reflects that a letter was sent to the Plaintiff-Appellant on October 29th, 1973, advising him of proposed suspension. The letter further advised him that he had twenty (20) days from the mailing of the notice to file a Petition in the Municipal Court. The letter, which is part of the evidence in this case, specifically stated:

> "If the described petition is filed, the effective date of *the suspension indicated above is automatically cancelled and the suspension will begin upon termination of any hearing and/or appeal* which results in a decision unfavorable to you. . . ." (Italics ours for emphasis.)

Clearly, the Plaintiff-Appellant in these proceedings was advised that the suspension was not immediately effective and that he had his opportunity to go to the Courts for a hearing if he so desired. This pronouncement by the Defendant in these proceedings clearly falls in line with

the interpretation of the Ohio Statute by the Courts in the case of *Fell* v. *Bureau,* ibid., and *Bell* v. *Curry,* ibid., in which the Courts have held that the suspension does not begin to run until after the hearing or any appeal therefrom.

CONCLUSION

In conclusion, it is respectfully submitted that Ohio Revised Code 4511.19.1 is constitutional as written and as interpreted by the Courts of Ohio. We therefore respectfully submit that the Motion to Dismiss the Appeal should be granted and that this Court should not in the alternative consider this matter as a Petition for Writ of Certiorari in light of the fact that the Plaintiff-Appellant has considered his brief to be basically a direct appellate proceeding. We respectfully submit in the current posture of the case based upon the record of the proceeding in the lower Court and on direct appeal and in light of the statute itself and its interpretation by the State Court this Court should grant the Motion to Dismiss.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-74475

JOHN A. WIETHE,
Plaintiff-Appellant,

vs.

C. DONALD CURRY, REGISTRAR,
Defendant-Appellee.

DECISION

Filed March 24, 1975

Mr. Marvin Kolstein, 607 Terrace Hilton Building, Cincinnati, Ohio 45202, for Plaintiff-Appellant.

Messrs. Simon L. Leis, Jr., Leonard Kirschner and Robert R. Hastings, Jr., 420 Hamilton County Courthouse, Cincinnati, Ohio 45202, for Defendant-Appellee.

PER CURIAM.

This cause came on to be heard upon the appeal, transcript of the docket and journal entries and original papers from the Hamilton County Municipal Court, transcript of the proceedings, the assignments of error, the briefs and arguments of counsel.

At approximately 12:15 A.M. on the morning of October 9, 1973, John Wiethe, the appellant herein, was traveling northbound on Interstate 75 at a rate of speed in excess of the posted limit. Patrolman Robert Lierman of the Cincinnati Police Department observed the appellant and caused the appellant to stop his vehicle.

After asking the appellant for his driver's license, an accident occurred between the appellant's vehicle and the officer's police cruiser prompting the officer to call his supervisor, Sergeant Howard Mills, to the scene. Thereafter, based upon Officer Lierman's observations of the appellant's driving and his physical condition, the appellant was charged with speeding and driving under the influence of an alcoholic beverage.

The appellant was then transported in his own vehicle to a Cincinnati police station where he was permitted to summon his attorney. Once appellant's counsel arrived, the appellant expressed an unwillingness to undergo a "Breathalizer" test unless it was supervised by a police officer of a rank higher than that of Sergeant Mills', and unless a physician was present to take a contemporaneous blood test.

The appellant reiterated his reluctance to take the test, predicating his reluctance on his fear that the test would be improperly administered. Deeming appellant's requirements to constitute *a refusal to take* the "Breathalizer" test, the police read to the appellant the Ohio Implied Consent Law and the ramifications of his refusal to take the test. Subsequently, the police forwarded the appropriate notice of such refusal to the Ohio Department of Motor Vehicles.

Thereafter, following a trial on charges of violation of R. C. 4511.19 in which appellant was found to be not guilty, the appellant was notified that his driver's license

was suspended, such suspension to begin upon the receipt by the Bureau of Motor Vehicles of appellant's license. In accordance with the provisions of that notice, the appellant filed a timely notice of appeal in the Hamilton County Municipal Court.

The cause was heard on August 7, 1974. At the conclusion of all the evidence and following the submission of supplemental memorandum briefs, the court ruled 1) that Section 4511.191, Ohio Revised Code is constitutional, and 2) that the appellant had failed to show any error on the part of the Registrar of the Bureau of Motor Vehicles. Whereupon, the appellant filed a timely notice of appeal to this Court.

Six assignments of error are presented for our review which will be considered in the order of their listing. The first assignment contains the assertion that Section 4511.191, O.R.C. is unconstitutional.

We preface our remarks on this assignment with the note that this statute has been judically construed in Ohio and has repeatedly been found to be constitutional by the courts of this State, including its highest court. See, *State* v. *Starnes,* 21 Ohio St. 2d 38; *Bell* v. *Curry,* 68 Ohio Op. 2d 109. We are obviously not at liberty to re-examine this basic determination.

In particular support of his contention of the statute's unconstitutionality, the appellant argues that the statute provides for a deprivation of property prior to notice and a hearing, thereby denying the petitioner, the appellant herein, due process under the law.

This contention is without foundation. Section 4511.-191 (E) provides that: "If a person whose license, permit to drive, or non-resident operating privilege has been suspended, petitions for a hearing or appeals any decision which is adverse to him, *the suspension shall begin at the*

termination of any hearing or appeal unless the hearing or appeal resulted in a decision favorable to the person." (emphasis added) Therefore, if the person institutes any type of appellate procedure regarding the suspension, the suspension *can not* take effect until the appellate procedures have been exhausted.

In *Fell* v. *Bureau of Motor Vehicles,* 30 Ohio App. 2d 151, the Court of Appeals for Cuyahoga County held that:

> "This is only a conditional or proposed suspension because if the licensee files a petition and requests a hearing, the suspension shall not begin until the hearing on the petition, or any appeal therefrom, is terminated unfavorably for the licensee. . . . Hence, under R. C. Section 4511.191 there will be a hearing and determination before the license is actually suspended unless no petition for hearing is filed."

By virtue of the Ohio Supreme Court's having dismissed an appeal taken from the above cited decision, we must assume that tacit approval has been accorded to it.

Accordingly, we hold that Section 4511.191, O.R.C. is constitutional, and appellant's first assignment of error is without merit.

In assignment number two, appellant contends that: Section 4511.191, if constitutional, was applied in an unconstitutional manner." The appellant maintains that through the letter sent to him by the Registrar, the appellant's driver's license was already under suspension, and had been effectively under suspension, since October 29, 1973.

For the reasons given in our consideration of appellant's first assignment of error, we conclude that appellant's license is not now under suspension, nor can it be under suspension until such time as all of the appellant's

appellate procedures have been exhausted. The second assignment of error is without merit.

Appellant argues in his third assignment of error that: "The Trial Court erred by not permitting appellant to amend his petition to conform to the evidence." The appellant incorporates into this argument the question of whether the "arresting officer" had in fact placed the appellant under arrest on the morning of October 9, 1973.

In spite of the fact that the petition was not amended to reflect the evidence adduced at the hearing, an examination of that evidence has convinced us that Officer Lierman had taken the appellant sufficiently under his control to have put the appellant on notice that he was under arrest. The testimony of Officer Lierman was that:

> "Q. Was Mr. Wiethe placed under arrest?
> A. Physically, did I say, 'I arrest you'? No.
> Q. Did you take him into custody?
> A. Yes, I had him in my control.
> Q. What charges was he taken under your control for?
> A. Speeding and driving under the influence of an alcoholic beverage."

While we agree with the holding of *Toledo* v. *Lowenberg*, 99 Ohio App. 165, that every stopping or detention of a person does not constitute an arrest, it is manifest from the facts before us that Officer Lierman had the requisite intent to arrest the appellant for speeding, and upon further investigation, to add the additional charge of driving while intoxicated. The officer's stopping of the appellant was clearly an arrest.

Therefore, the error of the Trial Court in failing to permit the amendment of the petition to conform to the

evidence was harmless. The third assignment of error is not well taken.

The appellant contends in his fourth assignment of error that: "The Trial Court erred in granting appellee's motion to strike paragraph (3 d) from appellant's petition." This paragraph reads: "That if the Plaintiff did refuse to submit to the test, it was upon the advice of his attorney, and that if Plaintiff follows the advice of his attorney he, therefore, does not come under the operation of Section 4511.191 of the Ohio Revised Code."

The contention raised herein is that the appellant was denied his statutory right to confer privately with counsel and to rely on the good faith of counsel not to take the "Breathalizer" test.

Whatever merit this argument might otherwise have, an examination of the record has failed to disclose any testimony on appellant's part, or other evidence, to the effect that his refusal to take the test was predicated upon the advice of counsel. On the contrary, appellant testified numerous times that his decision was predicated upon his own conclusion that the test would not be fairly administered because of acts and statements of the officers indicating a "prejudiced" attitude toward him. Appellant's failure to adduce any evidence from which it could properly be concluded that his reason for failing or refusing to take the test was founded on advice of counsel, necessarily removes this issue from our consideration. Moreover, while evidence was adduced tending to show that appellant and his counsel were not provided with a private room in which to confer, they were allowed to use a table in a corner of a room out of the earshot of Officers Lierman and Mills. Even if we were to hold that the right to confer with counsel attended these proceed-

ings, we would not view an accused's right to privately confer with counsel to require that he be provided with a private room.

Accordingly, appellant's fourth assignment is overruled.

Finally, in his fifth and sixth assignments of error, appellant argues that the judgment was contrary to the manifest weight of the evidence, and that appellant was not accorded that due process of law guaranteed him by the United States Constitution where he was precluded from designating an alcohol test of his own choosing. We elect to consider these assignments together because of their overlapping character.

In the determination of the first of these issues, our review is necessarily circumscribed by the holding in *State* v. *Starnes,* supra, the second syllabus of which is as follows:

> "2. Section 4511.191 (F), Revised Code, does not violate the due process clause of the Fourteenth Amendment to the United States Constitution by permitting suspension of a person's driver's license upon proof less than proof beyond a reasonable doubt that (1) a police officer had reasonable ground to believe the person had been driving a motor vehicle upon the public highways in this state while under the influence of alcohol (2) the person was placed under arrest (3) the person refused to submit to a chemical test upon request of the officer and (4) the person was advised of the consequences of his refusal. Proceedings under Section 4511.191 (F), Revised Code, are civil and administrative in nature and are intended for the protection of the travelling public, and are independent of any criminal proceedings which may be instituted pursuant to other statutes or ordinances."

Thus, if the record reveals credible evidence of probative value on each of the four elements of proof set forth above, we take it that the judgment of the trial court may not be said to be contrary to the manifest weight of the evidence, nor was it contrary to law, nor generally may it be said to conflict with requirements of due process of law, even where, as here, the appellant was acquitted of the separate criminal offense of driving while intoxicated growing out of the same incident giving rise to the Section 4511.191, Revised Code proceedings.

With respect to much of appellant's argument, we are constrained to point out that this Court is not free to indulge its own reasoning or rationale unless we are able to honestly conclude that the issue is one to which superior authority has not addressed itself. Where the Supreme Court has directly spoken to an issue, as here, debate is precluded, at this level, at least.

Examining the record against the *Starnes* criteria, we conclude that there was credible evidence which, if believed by the trier of facts, would support a finding: (1) that Officer Lierman had reasonable grounds to believe that the appellant was operating an automobile on a public highway while under the influence of alcohol, and that this determination is not necessarily animadverted by a subsequent failure to secure a conviction by proof beyond a reasonable doubt in a separate but related criminal charge; (2) that the appellant was placed under arrest, although these actual words were not used, where his liberty was restrained and he was taken into custody by Officers Lierman and Mills; (3) that appellant's willingness to take psychomotor tests *in lieu* of the breath test authorized by statute and regulations, whether or not his apprehensions in connection therewith were well founded, constituted a refusal to submit to a chemical

test upon request of the officer; and (4) the appellant was advised of the consequences of his refusal to take the chemical test.

The foregoing determinations dictate our overruling of appellant's fifth and sixth assignments of error, and our affirmance of the judgment below.

The judgment is accordingly affirmed.

SHANNON, P. J., PALMER and STRAUSBAUGH, J. J.

STRAUSBAUGH, J., OF THE TENTH APPELLATE DISTRICT, SITTING BY ASSIGNMENT IN THE FIRST APPELLATE DISTRICT OF OHIO.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX B

OHIO REVISED CODE § 4511.191

4511.191 Chemical tests for determining alcoholic content of blood; effect of refusal to submit to test.

(A) Any person who operates a motor vehicle upon the public highways in this state shall be deemed to have given consent to a chemical test or tests of his blood, breath, or urine for the purpose of determining the alcoholic content of his blood if arrested for the offense of driving while under the influence of alcohol. The test or tests shall be administered at the direction of a police officer having reasonable grounds to believe the person to have been driving a motor vehicle upon the public highways in this state while under the influence of alcohol. The law enforcement agency by which such officer is employed shall designate which of the aforesaid tests shall be administered.

(B) Any person who is dead, unconscious, or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn consent provided by division (A) of this section and the test or tests may be administered, subject to sections 313.11 to 313.16, inclusive, of the Revised Code.

(C) Any person under arrest for the offense of driving a motor vehicle while under the influence of alcohol shall be advised at a police station of the consequences of his refusal to submit to a chemical test designated by the law enforcement agency as provided in division (A) of this section. The advice shall be in a written form prescribed by the registrar of motor vehicles and shall be read to such person. The form shall contain a statement that the

form was shown to the person under arrest and read to him in the presence of the arresting officer and one other police officer or civilian police employee. Such witnesses shall certify to this fact by signing the form.

(D) If a person under arrest for the offense of driving a motor vehicle while under the influence of alcohol refuses upon the request of a police officer to submit to a chemical test designated by the law enforcement agency as provided in division (A) of this section, after first having been advised of the consequences of his refusal as provided in division (C) of this section, no chemical test shall be given, but the registrar of motor vehicles, upon the receipt of a sworn report of the police officer that he had reasonable grounds to believe the arrested person had been driving a motor vehicle upon the public highways in this state while under the influence of alcohol and that the person refused to submit to the test upon the request of the police officer and upon the receipt of the form as provided in division (C) of this section certifying that the arrested person was advised of the consequences of his refusal, shall suspend his license or permit to drive, or any nonresident operating privilege for a period of six months, subject to review as provided in this section; or if the person is a resident without a license or permit to operate a motor vehicle in this state, the registrar shall deny to the person the issuance of a license or permit for a period of six months after the date of the alleged violation.

(E) Upon suspending the license or permit to drive or nonresident operating privilege of any person, as provided in division (D) of this section, the registrar shall immediately notify the person in writing, at his last known address, and inform him that he may petition for a hearing as provided in division (F) of this section. If a per-

son whose license, permit to drive, or nonresident operating privilege has been suspended, petitions for a hearing or appeals any decision which is adverse to him, the suspension shall begin at the termination of any hearing or appeal unless the hearing or appeal resulted in a decision favorable to the person.

(F) Any person whose license or permit to drive or nonresident operating privilege has been suspended under this section, may, within twenty days of the mailing of the notice provided above, file a petition in the municipal court or the county court, or in case such person is a minor in the juvenile court, in whose jurisdiction such person resides or in whose jurisdiction the arrest occurred if such person is not a resident of this state, agreeing to pay the cost of the proceedings and alleging error in the action taken by the registrar of motor vehicles under division (D) of this section or in one or more of the matters within the scope of the hearing as provided in this section, or both. Such petitioner shall notify the registrar of the filing of the petition and send him a copy. The scope of such hearing shall be limited to the issues of whether a police officer had reasonable ground to believe the person had been driving a motor vehicle upon the public highways in this state while under the influence of alcohol, whether the person was placed under arrest, whether he refused to submit to the test upon request of the officer, and whether he was advised of the consequences of his refusal.

(G) The registrar shall furnish the court a copy of the registrar's affidavit as provided in division (C) of this section.

In hearing the matter and determining whether such person has shown error in the action taken by the registrar of motor vehicles under division (D) of this section, the

court shall decide such issue upon the registrar's certified affidavit and such additional relevant, competent, and material evidence as either the registrar or the person whose license is sought to be suspended submits.

In such proceedings the registrar shall be represented by the prosecuting attorney of the county where such person resides.

If the court finds from the evidence submitted that such person has failed to show error in the action taken by the registrar of motor vehicles under division (D) of this section or in one or more of the matters within the scope of the hearing as provided in division (F) of this section, or both, then the court shall assess the cost of such proceeding against such person and shall impose the suspension provided in division (D) of this section. If the court finds that such person has shown error in the action taken by the registrar of motor vehicles under division (D) of this section or in one or more of the matters within the scope of the hearing as provided in division (F) of this section, or both, the cost of the proceedings shall be paid out of the county treasury of the county in which the proceedings were held, and the suspension provided in division (D) of this section shall not be imposed. The court shall give information in writing of the action taken to the registrar of motor vehicles.

(H) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this state has been suspended, the registrar shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he has a license.

(1971 H 792, eff. 2-3-72. 1969 H 1; 132 v S 512, H 380)

APPENDIX C

OPINION OF HAMILTON COUNTY MUNICIPAL COURT

JAMES R. BELL

Plaintiff,

v.

C. DONALD CURRY,
Bureau of Motor Vehicles,

Defendant.

HAMILTON COUNTY MUNICIPAL COURT.

(No. 163586—Decided February 25, 1974.)

Jerome L. Schimpf, of Cincinnati, for Plaintiff.

Simon L. Leis, Jr., prosecuting attorney, *Leonard Kirschner* and *Robert Hastings,* assistant prosecuting attorneys, all of Cincinnati, for Defendant.

SCHOTT, J. This matter having come before the court on the Amended Complaint filed by the plaintiff and upon the Answer thereto, and upon the evidence and the exhibits which were introduced into evidence, this court does hereby find that there were two issues submitted to this court, namely, did the arresting officer have reasonable grounds to believe that the plaintiff had been operating his motor vehicle upon the public highways of this State while under the influence of alcohol; and, whether R.C. § 4511.19.1 is constitutional in light of recent rulings by the United States Supreme Court.

As to the first issue, it is quite clear that from the evidence presented that the officer who made the arrest had more than a reasonable ground to believe that the plaintiff was operating his motor vehicle upon the public highways of this State while under the influence of alcohol. The testimony of the plaintiff, himself, admitted the fact that he had been drinking, that he was operating his motor vehicle in the wrong direction on a one-way street, and that he struck another automobile while so operating his motor vehicle.

The next question presented in the course of the proceedings was taken under submission by this court in order to research the legal points raised during argument as to the constitutionality of R.C. § 4511.19.1 in light of recent United States Supreme Court rulings in this general area.

There was cited for consideration of this court and the basic authority, the case of *Bell* v. *Burson* as reported in 402 U.S. 535, 29 L.Ed.2d 90, 91 S.Ct. 1586. It is the opinion of this court that the factual situation as presented in the *Bell* v. *Burson* case is clearly distinguishable from the factual situation as presented in this case insofar as statutory requirements are concerned under R.C. § 4511.-19.1. In fact, as will be hereinafter set forth, it is the belief of this court that a careful reading of the United States Supreme Court decision in the *Bell* v. *Burson* matter clearly indicates that the procedures set up by the Ohio Legislature in setting up the Ohio Implied Consent Law, as this Section is commonly referred to, clearly affords due process to any person or persons who are to be deprived of their driving rights. This was completely contrary to any procedures afforded by the Georgia statute in the case of *Bell* v. *Burson*.

As Mr. Justice Brennan who delivered the Opinion of the Court in the *Bell* v. *Burson* case stated on page 94 of the Law Edition Opinion:

"Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. . . .This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a 'right' or a 'privilege'."

This court agrees with this general proposition of law as set forth by the United States Supreme Court.

Therefore, the issue before this court is whether or not Ohio's Implied Consent Law affords a due process hearing for the purposes of suspension of a license? A little earlier than one year prior to the *Bell* v. *Burson* case, the Ohio Supreme Court in the case of *State* v. *Starnes,* 21 OhioSt.2d 38, 50 O.O.2d 84, specifically declared Ohio's Implied Consent Law constitutional and stated that in their opinion the statute did not violate the due process requirements of the United States Constitution or the Constitution of the State of Ohio. However, as indicated above, the Ohio Supreme Court case was determined a little over one year prior to the *Bell* v. *Burson* case and this court has found no specific reference by the Ohio Supreme Court insofar as Ohio's Implied Consent Law is concerned and the issues raised by *Bell* v. *Burson.* Therefore, this court will proceed to compare Ohio's Implied Consent Law as against the statute which was before the United States Supreme Court in the *Bell* v. *Burson* case.

The Georgia statute which was under attack in *Bell* v. *Burson* provided that the license of an uninsured motorist involved in an accident shall be suspended unless he posts security to cover the amount of the damages claimed by the aggrieved parties. The Georgia law specifically excluded consideration of the motorist's fault or liability for the accident saying that in their numerous decisions interpreting their law that the fault or innocence of the parties had nothing to do with the requirement to post the insurance in question. The Supreme Court of the United States held in *Bell* v. *Burson* that the State had the authority to bar the issuance of licenses to all motorists who did not carry liability insurance or who did not post security. However, the Supreme Court held that there had to be some opportunity afforded and reasonable relationship to the liability in order to suspend a license as to one particular segment of the population who did not have insurance and who were involved in accidents. The Supreme Court of the United States then goes on to compare the Georgia statute and show that the basic interpretation and reason for the Georgia statute was that it was to be used as a club or force to see to it that persons injured by uninsured motorists were paid. The Court states in their Opinion that the Georgia statute specifically authorizes the reissuance of a license or the keeping of a license by an uninsured motorist involved in an accident if the aggrieved party has been compensated or signs a release authorizing the release of this license. The Court goes behind the basic wording of the statute and says that this is a form of guaranteeing the payment to injured parties by uninsured motorists and in effect is a demtermination of responsibility statute. The Supreme Court of the United States has said that the fact that the determination of responsibility being an integral part of the whole pro-

ceeding; the failure of the allowance of a hearing anywhere in the proceedings on this issue denies the uninsured motor vehicle operator due process of law in the taking of his license.

R.C. § 4511.19.1 (F) specifically affords the person whose license is to be taken an opportunity to be heard. Counsel for the plaintiff in these proceedings agrees with the fact that Ohio does afford a hearing under R.C. § 4511.19.1 (F). However, counsel's argument is that Ohio does not afford the motorist whose license is to be suspended a hearing prior to the suspension of the driving rights.

A full and complete reading of the Section of the Code in question would require this court to disagree with the interpretation of counsel for the plaintiff in this proceeding. The Section specifically says that the aggrieved party has twenty days within which to file a pleading in the Court in the jurisdiction where he resides to afford him the opportunity of a hearing. The statute in question also specifically authorizes the motorist to operate his motor vehicle during the pendency of the hearing which he has requested and any appeals therefrom. It is the belief of this Court that the Ohio Implied Consent Law (R.C. § 4511.19.1) has to be read as an entirety and that there is no effective suspension until the passing of twenty days from the date of the mailing of a letter of notification to the motorist involved. It is the belief of this court that Ohio's statutory provision affording the opportunity of a hearing to the aggrieved party without the loss of any rights pending the hearing and full determination of the issues raised clearly does not violate any due process requirements of the United States Constitution or of the Constitution of the State of Ohio.

The Ohio Supreme Court has specifically ruled that this

proceeding is a civil administrative proceeding (*State* v. *Starnes,* 50 O.O.2d 84 at page 88).

It is therefore the opinion of this ocurt that the plaintiff's second argument that R.C. § 4511.19.1 is unconstitutional because it does not afford a hearing and therefore violates the due process requirements of the United States Constitution and the Constitution of the State of Ohio is without merit.

Accordingly, there being a failure in the showing of any error and the statute being determined to be constitutional this court does hereby uphold the order of suspension which has been held in abeyance pending the determination of this case and does hereby reinstate said suspension as against the plaintiff in these proceedings for a period of six months as provided by law.

Costs of these proceedings are taxed to the plaintiff.